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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 510

SANTO R. SGARLATO, JR.,
Petitioner,

v.

SOLOMON O. KLEIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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No.

SANTO R. SGARLATO, JR.,
Petitioner,

v.

SOLOMON O. KLEIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on June 14, 1968, affirming the order of the Appellate Division, Second Department, of the Supreme Court of the State of New York, dated February 17, 1967, suspending petitioner from the practice of law for a period of two years.

OPINIONS BELOW

The Court of Appeals wrote no opinion. The opinion of the Appellate Division is reported at 27 A.D.2nd 738, 277 N.Y.S.2nd 318.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3). The judgment of the Court of Appeals was entered on June 14, 1968.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment Privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, forbids the use in judicial disciplinary proceedings with respect to an attorney, of inculpatory evidence obtained from the attorney by the coercive threat of disbarment if he refused to furnish the incriminating evidence.

2. Whether the Fourth Amendment, as applied to state action through the Fourteenth Amendment, prohibits the use in judicial disciplinary proceedings with respect to an attorney, of evidence contained in the attorney's testimony and private papers, or the fruits thereof, obtained from the attorney by an unconstitutional threat of disbarment if he refused to provide the testimony and furnish the private papers or as the result of an unconstitutionally broad demand for private papers.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

UNITED STATES CONSTITUTION, AMENDMENT V

No person . . . shall be compelled in any criminal case to be a witness against himself . . .

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1 . . . nor shall any State deprive any person of life, liberty or property without due process of law; . . .

STATEMENT OF CASE

Petitioner was admitted to practice as an attorney and counselor at law in the State of New York on October 19, 1955. Almost nine years ago, on November 5, 1959, in response to subpoenas, petitioner appeared as a witness before the Judicial Inquiry, established by order of the Appellate Division to investigate professional conduct, and refused to answer questions and to produce records in reliance on the Fifth Amendment privilege against self-incrimination because of the possibility of criminal prosecution. Following this Court's decision in *Cohen v. Hurley*, 366 U.S. 117, the Judicial Inquiry by letter of October 24, 1961, advised petitioner of this Court's affirmance of the "decision disbarring Albert Martin Cohen for his refusal to answer pertinent questions before the Additional Special Term, albeit Mr. Cohen likewise based this refusal on the grounds of self-incrimination." He was further advised that "Mr. Justice Baker is prepared to accord you another opportunity to testify."

The Judicial Inquiry had received no complaints concerning petitioner and was making inquiry with respect to no specific matters. It was conducting a general investigation of petitioner's practice and requested him to "bring with you all financial records pertinent to your practice of law as described in the subpoena duces tecum served upon you." A subpoena directed him to produce all conceivable financial records pertaining to his practice as an attorney from the day he was admitted to the bar to the time of the investigation. He was also informed that subsequently he

would be asked to produce certain of the legal files relating to his cases and was, in fact, requested to furnish more than 200 clients' files. Under the implied threat of disbarment for failure to comply embodied in the reference to *Cohen v. Hurley, supra*, petitioner appeared before the Judicial Inquiry on November 2, 1961, with the records demanded and thereafter testified and produced the financial records and clients' files requested.

Disciplinary proceedings were instituted against petitioner in November 1964 by a petition which set forth 29 charges of alleged misconduct some of which could have subjected petitioner to criminal prosecution. Petitioner denied all the charges except one relating to failure to maintain a separate account for clients' funds. Extensive hearings were held before Justice Nicholas M. Pette, a Justice of the Supreme Court of the State of New York to whom the disciplinary proceeding had been referred for hearing and a report of his findings on the issues. Petitioner was called as a witness and his testimony before the Judicial Inquiry and the records he produced under threat of disbarment were introduced in evidence (Tr. 152). This evidence and his testimony at the hearing provided a substantial amount of the proof offered in support of the charges (Tr. 153-207, 345-359, 591-739, 757-878, 1001-1123). Virtually all the proof was derived from petitioner's compelled disclosures and production.

Justice Pette's report, dated April 12, 1966, found seven of the 29 charges sustained and the remaining charges not sustained. In concluding his report, Justice Pette observed that petitioner "was a popular young neighborhood lawyer in whom his clients apparently had faith and confidence" and "that no complaint was ever made by them" (Report, p. 68). He remarked that petitioner "committed many of the offenses charged due to his inexperience and ignorance" and commented that "the mass of specifications and extensive hearings have yielded but several charges which have been sustained". He further noted that petitioner "has dem-

onstrated that he has a potential future useful service to the public and the bar" (Report, pp. 68-69).

On February 14, 1967, on cross-motions to confirm and disaffirm Justice Pette's Report, the Appellate Division held that eight additional charges had been sustained. Its accompanying opinion recited: "In mitigation of the discipline to be imposed upon respondent [petitioner], we have considered the absence of any complaints by his clients, the fact that almost all the proved misconduct occurred prior to 1960, and the absence of any charges in the intervening years." Petitioner was ordered suspended from the practice of law for a period of two years commencing March 6, 1967.

On April 10, 1967, petitioner moved for reargument of the order of suspension and, alternatively, for leave to appeal to the Court of Appeals. The motions were predicated on the claim that "the order of suspension is void under the United States Constitution in that it is indispensably derived from and based upon evidence obtained in violation of my privilege against self-incrimination under the Fifth and Fourteenth Amendments." Petitioner cited and relied upon this Court's decision a few months earlier in *Spevack v. Klein*, 385 U.S. 511, which overruled *Cohen v. Hurley*, 366 U.S. 117. On the same day, April 10, 1967, petitioner also appealed as of right to the Court of Appeals on the ground that a constitutional question under the Fifth and Fourteenth Amendments was directly involved. By order of July 10, 1967, the Appellate Division denied reargument but granted petitioner leave to appeal certifying that "questions of law have arisen which in its opinion ought to be reviewed by the Court of Appeals."

On June 14, 1968, the Court of Appeals, without opinion, affirmed the order of the Appellate Division. The remittitur of the cause by the Court of Appeals to the Appellate Division, as amended, recited that on appeal there was presented and necessarily passed upon the question of whether petitioner "was deprived of due process in violation of the Fifth and Fourteenth Amendments to the Con-

stitution of the United States in that there were introduced against him in this disciplinary proceeding statements elicited from him under threat of disbarment if he did not make such statements. The Court of Appeals held that there was no violation of appellant's [petitioner's] constitutional rights."

REASONS FOR GRANTING THE WRIT

Spevack v. Klein, 385 U.S. 511, established that an attorney may not be disbarred for his refusal to furnish records and information relating to his practice of law in reliance on the privilege against self-incrimination. See also *Uniformed Sanitation Men v. Commission of Sanitation*, 392 U.S. 280; *Gardner v. Broderick*, 392 U.S. 273. Petitioner, under threat of disbarment for failure to do so, complied with a request by the Judicial Inquiry for information and records. The evidence compelled by threat of disbarment was the basis of subsequent disciplinary proceedings against him resulting in the suspension order of February 14, 1967, which is the subject of this petition. Clearly, this compelled testimony could not have been used against petitioner in a criminal prosecution (*Garrity v. New Jersey*, 385 U.S. 493) or in a proceeding for forfeiture of his property. *Boyd v. United States*, 116 U.S. 616. The New York Court of Appeals has recently held that attorneys "had no privilege against making disclosures usable only in a disciplinary proceeding. The Constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment." *Zuckerman v. Greason*, 20 N.Y.2d 430, 438, 285 N.Y.S.2d 1, 6 (1967). Obviously, this holding determined the Court of Appeals' rejection of petitioner's claim of a violation of his rights under the Fifth and Fourteenth Amendments.

The New York Court of Appeals has thus decided in the present case that evidence coerced by threat of disbarment may be used against an attorney in a disciplinary pro-

ceeding. This is a question of substance under the Fifth Amendment which has not heretofore been determined by this Court and deserves the Court's consideration because the decision below appears inconsistent with the decisions of this Court that the forfeiture of property is a criminal case under the Fifth Amendment *(Boyd v. United States, supra)* and that denial of the right to practice law is punishment under the bill of attainder prohibitions of the Constitution. *Ex parte Garland,* 4 Wall. 333,377. The case also involves the closely related question whether the coercive nature of the Judicial Inquiry's demand (*Boyd v. United States, supra)* or its broad scope *(Federal Trade Commission v. American Tobacco Company,* 264 U.S. 298) constituted an unreasonable search under the Fourth Amendment which which brought into play the exclusionary rule held applicable to the States in *Mapp v. Ohio,* 367 U.S. 643.

1. Petitioner's claim of a violation of the privilege against self-incrimination rests on the contention that the suspension of an attorney from the practice of law is within the protection of the privilege because it is the equivalent of a criminal penalty and that the use in the disciplinary proceeding of incriminating evidence compelled by threat of disbarment constituted an invasion of the privilege. The holding of the Court of Appeals that there was no violation of petitioner's constitutional rights is presumably based upon the rationale that a disbarment proceeding is not a "criminal case" within the meaning of the privilege against self-incrimination. *Zuckerman v. Greason,* 20 N.Y.2d 430; 285 N.Y.S.2d 1 (1967); *In re Ungar,* 27 A.D.2d 925, 282 N.Y.S.2d 158 (1st Dept., 1967).

If suspension from the bar is a criminal penalty, the Fifth Amendment precludes the use of coerced testimony in the disciplinary proceeding. The compulsion of incriminating testimony generates an immunity from sanctions which are "criminal in nature" *(Ullmann v. United States,* 350 U.S. 422, 431) whether or not the immunity is contemplated when the testimony is compelled. *Garrity v. New Jersey,*

385 U.S. 493. Consequently, after petitioner invoked his privilege against self-incrimination, compelling him to testify under threat of disbarment barred the use of this testimony in any proceeding which might result in the imposition of a penalty of a criminal nature. In *Ullmann v. United States, supra,* where the constitutionality of an immunity statute was assailed on the ground that the testimony compelled might result in disqualification from federal employment and other disabilities, the Court stated that a witness who is compelled to answer under the protection of immunity "has, of course, when a particular sanction is so sought to be imposed against him, the right to claim that it is criminal in nature." 350 U.S. at 431. The use of compelled testimony in the present case, therefore, squarely poses the question whether a disciplinary proceeding is a "criminal case" within the meaning of the Fifth Amendment's prohibition against compelled, self-incriminating testimony.

There is formidable authority in the decisions of this Court for the view that, for self-incrimination purposes, a disciplinary proceeding is criminal in nature. *Boyd v. United States,* 116 U.S. 616; *Lees v. United States,* 150 U.S. 476; cf. *Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 701. Certainly, the loss of one's right to practice his profession, whether temporary or permanent, is no less a criminal penalty than the forfeiture of property involved in the *Boyd* case. The continued vitality of the *Boyd* case was underscored by the reaffirmation in *Spevack v. Klein* "of the broad protection given the privilege" in *Boyd v. United States, supra.* In *Boyd* "compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself" (385 U.S. at 515). The *Lees* and *Plymouth Sedan* cases also involved property forfeitures. The dissenting opinions in *Cohen v. Hurley,* 366 U.S. 117, overruled in *Spevack v. Klein,* 385 U.S. 511, expounded the views that the effects of disbarment were so severe as to entitle a lawyer to "the full benefit of the 'law of the land'" (366 U.S. at 147) and that "taking away a man's right to

practice law is imposing a penalty as severe as a criminal sanction" (366 U.S. at 153-154). Although disbarment has a more severe effect on the attorney involved than suspension, suspension is more clearly imposed as punishment. The purpose of disbarment may be to protect the public from an unfit practitioner. Suspension for a two-year period, however, acknowledges that the attorney is not unfit to practice law by recognizing him as a suitable practitioner after expiration of the suspension period. The suspension is obviously punishment for misconduct.

Denial of the right to engage in the practice of law or in other occupations has been held similar to a criminal penalty for the purpose of other constitutional provisions. An attorney has been held "entitled to procedural due process, which includes fair notice of the charge" in disciplinary proceedings because they "are proceedings of a quasi-criminal nature" and disqualification from practice "is a punishment or penalty imposed on the lawyer." *In Re Ruffalo,* 390 U.S. 544. Disqualification from the practice of law, as well as the pursuit of other vocations, has been regarded as punishment for purposes of the Constitution's bill of attainder and ex post facto prohibitions. *Ex Parte Garland,* 4 Wall. 333, 377 (Legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri,* 4 Wall. 277, 327 ("This deprivation [of right to pursue regular avocations] is punishment"); *United States v. Lovett,* 328 U.S. 303, 316 ("permanent proscription from any opportunity to serve the Government is punishment"); *United States v. Brown,* 381 U.S. 437 (Disqualification from holding union office held punishment). No reason is readily apparent why disqualification from practicing law, which has been regarded as a criminal penalty for the purpose of other constitutional safeguards, should not similarly be regarded as criminal punishment for purposes of the privilege against self-incrimination. The question whether disciplinary action against attorneys is within the protection of the privilege, therefore, warrants review by this Court.

The importance of determining whether a disciplinary proceeding is a criminal case for purposes of the privilege is accentuated by the interpretation of the Court's recent decisions in *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280 and *Gardner v. Broderick*, 392 U.S. 273, as indicating that attorneys may be compelled, absent the possibility of criminal prosecution, to provide information that may lead to their disqualification from practice. The opinion of the Court by Mr. Justice Fortas in the *Gardner* case (p. 278) acknowledged that if "a policeman had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal." Mr. Justice Harlan, however, apparently derives from this the conclusion that an attorney similarly may be disbarred, notwithstanding the decision in *Spevack v. Klein, supra*, for refusing to answer questions concerning the practice of his profession. In a concurring opinion, joined by Mr. Justice Stewart, he finds in the *Gardner and Uniformed Sanitation* cases "a procedural formula whereby" lawyers may be "disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices" (392 U.S. at 285). Obviously, if lawyers may be punished for refusing to disclose information that may lead to disciplinary action, such punishment is not within the protection of the privilege. Mr. Justice Fortas, however, expressly differentiated the situation of a public official from that of a lawyer, thereby suggesting that, even absent the possibility of criminal prosecution, the lawyer may not be disciplined for refusing to provide information concerning his law practice presumably because disciplinary proceedings are within the scope of the privilege. The desirability of a dispositive decision of this Court to resolve any doubt on the important constitutional question whether the privilege applies to

the penalty of disqualification from the practice of law seems apparent.

2. The compulsory production of petitioner's testimony and private papers under an unconstitutional threat of disbarment and the dragnet demand for all petitioner's financial records and virtually all his client's files constituted an illegal search and seizure under the Fourth Amendment.[1]

A. *Spevack v. Klein, supra,* decided that a lawyer cannot be disbarred because of his refusal to testify at a disciplinary investigation in reliance on the privilege against self-incrimination. Petitioner, however, under threat of disbarment in violation of his constitutional rights, was compelled to forego the privilege and supply inculpatory records and information. The fruits of this unconstitutional compulsion were the basis for his suspension. *Boyd v. United States, supra,* held that "a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment" (116 U.S. at 622). Coerced production for disciplinary purpose would appear similarly to be within its scope.

B. The all encompassing scope of the Judicial Inquiry's demand for petitioner's financial records and other files violated the Fourth Amendment requirement that a demand "be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See v. City of Seattle,* 387 U.S. 541, 544. See also *United States v. Morton Salt Company,* 338 U.S. 632; *Oklahoma Press Publishing Company v. Walling,* 327 U.S. 186; *United States v. Bausch and Lomb Optical*

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[1] Petitioner did not raise a Fourth Amendment question in the proceedings below. Because of the close connection between the concepts embodied in the Fourth and Fifth Amendments (*Boyd v. United States, supra; Mapp v. Ohio, supra),* however, the court may wish to consider petitioner's constitutional claim in terms of the Fourth, as well as the Fifth, Amendment.

Company, 321 U.S. 707; *Hale v. Henkel*, 201 U.S. 43. Fishing expeditions into private papers in the hope of finding some transgression are not countenanced by the Fourth Amendment. *Federal Trade Commission v. American Tobacco Company*, 264 U.S. 298.

C. The exclusionary rule with respect to evidence obtained by an unreasonable search was held applicable to state proceedings in *Mapp v. Ohio*, 367 U.S. 643. The Fourth Amendment has been held applicable to administrative investigations (see, e.g. *See v. City of Seattle, supra*), and the policy of the exclusionary rule to discourage violation of the constitutional protection would seem to preclude the State's use of evidence obtained in violation of the Fourth Amendment in a civil or quasi-criminal, as well as a criminal, proceeding. See *Mapp v. Ohio, supra; Elkins v. United States*, 364 U.S. 206. Evidence tainted by an unreasonable search has been held by a Court of Appeals inadmissible in an administrative proceeding which resulted in a cease and desist order. *Knoll Associates, Inc. v. Federal Trade Commission*, 396 F.2d __ (1968 Trade Cases 72, 494, C.A. 7, decided June 18, 1968). The same policy should preclude use in disciplinary proceedings of the product of the constitutional invasion to the detriment of the person whose constitutional privilege was violated. The present case thus presents a question of important constitutional dimensions under the Fourth, as well as the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF APPELLATE DIVISION

(February 14, 1967)

In the Matter of SANTO R. SGARLATO, JR., an Attorney, Respondent. SOLOMON A. KLEIN, Petitioner.—This is a proceeding to discipline respondent, an attorney at law, for professional misconduct based on 29 charges, many of which involve a number of specifications. The Justice of the Supreme Court to whom the issues were referred has held extensive hearings and has filed his report. He found that charges 1, 10, 11, 18, 22, 24 and 26 were sustained and that the other charges were not sustained. Petitioner now moves to confirm the findings as to the charges thus reported as sustained and to disaffirm the findings as to charges 2, 3, 7, 8, 9, 14, 17 and 29, making no application with reference to the findings as to charges 6, 12, 15, 16, 19, 20, 21, 25, 27 and 28. He has conceded that charges 4, 5, 13 and 23 were not established. Respondent cross-moves to disaffirm the report with respect to the charges found therein to have been sustained and to confirm the report as to the remaining charges. As to charges 1, 11, 22, 24 and 26, the findings that they were sustained are confirmed. Charge 1 was that respondent, retained as attorney on behalf of infant claimants to recover damages for personal injury, compromised their claims without court approval. Charge 11 was that respondent caused a client to execute a retainer agreement in which the name of the attorney was left blank and thereafter accepted it and acted thereunder. Charge 22 was that respondent, in the years 1956 through 1959, did not file statements of retainer in contingent fee negligence matters. The evidence indicates that during the years in question he failed to file at least 60 statements of retainer. Charge 24 was that respondent, in the years 1956 through 1961, failed to maintain proper books and records of his transactions with clients. Charge 26 was that respondent, from October, 1955 to June, 1960, failed to maintain a

separate trust account for the deposit of clients' and escrow funds and commingled such funds with his own money. As to charges 10 and 18, the findings that they were sustained are confirmed and we make additional or different findings as to certain evidentiary matter supporting such findings, as stated below. Charge 10 was that in the period from January 1, 1956 to June 30, 1960 respondent deceived this court by knowingly filing numerous statements of retainer in contingent fee negligence matters which misstated the agreed terms of his compensation. While we agree with the Justice's incidental finding that an intent to deceive was not proved, we believe that respondent's conduct indicated a reckless disregard of the pertinent rule of this court. Charge 18 was that respondent employed lay persons to solicit individuals having negligence claims to retain him as their attorney. The Justice sustained this charge on the basis of only one of the six matters involved in this charge, the Palefsky matter. We confirm the finding not only on the basis of that matter but also the Cannano and the John Barone matters. As to charges 2, 3, 7, 8, 9, 14, 17 and 29, the findings that they were not sustained are disaffirmed and we find that these charges were sustained, except that charges 8, 9 and 29 were sustained in part. Charge 2 was that respondent, representing infant clients, defrauded the infants by taking excessive fees without court approval. We find this charge sustained in that, regardless of the fact that in some cases the fee might not have been excessive, respondent failed to obtain court approval for the fees. In any event, we also find that with respect to three clients, the two De Marco infants and the Hanson infant, respondent received an excessive fee, the equivalent of 50% of the settlements. Charge 3 was that respondent defrauded infant clients by paying money, out of settlements of their claims, to third persons without court approval. This charge must be sustained, in that it was conceded that in two in-

stances respondent had paid moneys out of infants' settlements, without court approval, to a physician who had rendered services in connection with the infants' claims. Charge 8 was that respondent received $797 for the purpose of paying medical expenses incurred by his clients, which moneys he deposited in his own account and diverted to his own use. Charge 9 was that respondent received $300 from certain clients over a period of time to be held in escrow and that he diverted these funds to his own use. In our opinion, the evidence sustains these two charges to the extent that respondent improperly commingled his clients' funds with his own. Charge 14 was that respondent accepted retainers from clients and acted as their attorney when the interests of such clients were in conflict. In our opinion, the evidence sustains the charge with regard to the specification involving the Di Tucci accident of May 9, 1957. Charge 29 was that respondent obstructed the judicial inquiry by knowingly giving false, misleading and perjurious testimony before the Additional Special Term. In our opinion, in the incidents designated 1, 3 and 4 in the Justice's consideration of this charge respondent gave false and misleading testimony in an apparent attempt to obstruct the Judicial Inquiry. To this extent the charge is sustained. The evidence clearly proved charges 7 and 17. Charge 7 was that respondent knowingly caused a complaint in an action to be prepared, verified and served, in which it was falsely alleged that one of the plaintiffs had been appointed guardian ad litem of the two infant plaintiffs. Charge 17 was that respondent made a valuable gift to an insurance company adjuster with intent to influence his actions. Accordingly, petitioner's motion is granted with respect to charges 1, 2, 3, 7, 10, 11, 14, 17, 18, 22, 24 and 26; is granted with respect to charges 8, 9 and 29 only to the extent indicated; and is otherwise denied; and respondent's cross motion is denied insofar as it is with

respect to these 15 charges and is otherwise granted. In mitigation of the discipline to be imposed upon respondent, we have considered the absence of any complaints by his clients, the fact that almost all the proved misconduct occurred prior to 1960, and the absence of any charges in the intervening years. Accordingly, respondent is suspended from the practice of law for a period of two years, commencing March 6, 1967. Beldock, P. J., Ughetta, Christ, Brennan and Benjamin, JJ., concur.

ORDER OF SUSPENSION OF APPELLATE DIVISION

(February 14, 1967)

A disciplinary proceeding having been instituted in this court by petitioner, Solomon A. Klein, against respondent Santo R. Sgarlato, Jr., an attorney and counselor at law admitted to practice by this court on October 19, 1955, under the name of Santo Rocco Sgarlato, Jr., the petition praying that the said respondent be disciplined for professional misconduct upon the charges therein set forth; the said respondent having filed his answer to said petition; this court by order dated December 4, 1964 having referred the issues raised by the pleadings to the Honorable Nicholas M. Pette, Justice of the Supreme Court, for hearing and for a report setting forth his findings upon the issues; the said Justice having held hearings and having filed his report setting forth his findings, together with a transcript of the testimony and the exhibits; petitioner having moved by notice of motion dated October 31, 1966 to confirm the said report with respect to the findings which sustain charges 1,10,11,18,22,24 and 26 and to disaffirm the report with respect to the findings which fail to sustain charges 2,3,7, 8,9,14,17 and 29; respondent having cross moved to disaffirm the report with respect to the charges found therein to have been sustained and to confirm the report as to the remaining charges;

NOW, upon the said petition, verified November 19, 1964; upon the said answer verified November 27, 1964; upon the said report of Mr. Justice Pette, dated April 12, 1966; upon the said transcript and exhibits; and upon all the papers filed herein; and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof; and Solomon A. Klein, Esq., petitioner appearing in person, and Rudolph F. DiBlasi, Esq., appearing of Counsel for respondent; and due deliberation having been had thereon; it is:

ORDERED that the said motions by petitioner and respondent are hereby respectively granted and denied to the

extent set forth in the opinion and decision slip of the court herein; and it is further

ORDERED that the said report of Mr. Justice Pette is hereby confirmed to the extent set forth in the said opinion and decision slip of the court herein, and otherwise disaffirmed; and new findings of fact are hereby made as indicated in said opinion and decision slip; and it is further

ORDERED that the respondent Santo R. Sgarlato, Jr., is hereby suspended from the practice of the law for a period of two years commencing March 6, 1967 and continuing until the further order of this court, with leave to apply for reinstatement after the expiration of said period of two years, upon furnishing satisfactory proof that during said period he has actually refrained from practicing or attempting to practice as an attorney and counselor at law, that he has fully complied with this order and with the instructions annexed hereto and that he has otherwise properly conducted himself; and it is further

ORDERED, pursuant to Statute (Judiciary Law, § 90), that the said respondent Santo R. Sgarlato, Jr., during the period of such suspension and until the further order of this court, is hereby directed to desist and refrain from the practice of the law in any form, either as principal or agent or as clerk or employee of another; he is forbidden to appear as an attorney and counselor at law before any court, judge, justice, board, commission or other public authority; and he is hereby forbidden to give to another any opinion as to the law or its application or any advice in relation thereto.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

Judgment of Court of Appeals
(June 14, 1968)

MTR OF SGARLATO ORDER AFFIRMED WITHOUT COSTS NO OPINION ALL CONCUR

RAYMO D J CANNON CLERK COURT OF APPEALS ALBANY.

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 510

SANTO R. SGARLATO, JR.,
Petitioner,

SOLOMON A. KLEIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Matter of Fata, 22 A D 2d 116, leave to appeal den., 15 NY 2d 487, cert. den. 382 U.S. 917, sub. nom. Fata v. Co-ordinating Committee on Discipline	14
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IN THE

Supreme Court of the United States

October Term, 1968

No.

SANTO R. SGARLATO, JR.,

Petitioner,

SOLOMON A. KLEIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner seeks review of an order of the New York Court of Appeals, entered June 14, 1968, which unanimously affirmed an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered February 14, 1967, suspending petitioner from the practice of law for a period of two years for professional misconduct.*

Opinions Below

The memorandum opinion of the Appellate Division (Appendix of Petition) is reported in 27 A D 2d 738. The order of the Court of Appeals affirming the order of the Court below without opinion is reported in 22 N Y 2d 813. The

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* Petitioner's application for a stay of the suspension order was denied by Mr. Justice Harlan on August 17, 1968, with the following notation: "Denied, because I believe that there is no reasonable likelihood that certiorari will be granted." A stay was thereafter granted by Mr. Justice Black pending timely filing and disposition of a petition for a writ of certiorari.

amended remittitur of the Court of Appeals has not yet been reported and is printed in the appendix annexed hereto.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. 1257 (3).

Statutes Involved

The pertinent constitutional and statutory provisions are set forth in the Appendix to this brief. They are: (1) the Fifth and Fourteenth Amendments to the United States Constitution, (2) section 90, subd. 2, of the New York Judiciary Law, (3) the Rules of the New York Appellate Division regulating the conduct of attorneys who engage in personal injury practice on a contingent fee basis, (4) section 474 of the New York Judiciary Law, (5) Article 80 of the New York Civil Practice Act, and (6) subds. 1, 3, 7 and 9 of Rule 294 of the New York Rules of Civil Practice.

Statement of Case

On November 5, 1959, petitioner appeared at an Additional Special Term of the Supreme Court of New York in a preliminary investigation into the conduct of attorneys engaged in contingent-fee negligence practice. The investigation was ordered by the Appellate Division of the Second Judicial Department which is charged by statute with the duty to supervise the professional conduct of attorneys (New York Judiciary Law, Sec. 90 Subdv. 2) (A3). When called as a witness, petitioner refused to answer any ques-

tions claiming Fifth Amendment privilege against self-incrimination. He was therefore excused (Exh. 16, s.m. 26500-26510). A year and a half later, this Court rendered the decision in *Cohen* v. *Hurley,* 366 U.S. 117. Thereupon, petitioner spoke to Mr. Hurley, Counsel of the Judicial Inquiry, and requested an opportunity to appear and testify. Petitioner's testimony at the preliminary investigation shows:

> "Q. When did the decision of the Supreme Court first become known to you in the Cohen case? When did you first learn of it? A. Gee, I don't remember.
>
> Q. Well, when you learned of it, what steps did you take with regard to your position before the Inquiry in that you had also pleaded the Fifth Amendment?
>
> Mr. Panken: If your Honor pleases, may I ask what the purpose of these questions is?
>
> The Court: The purpose is this. In a number of instances attorneys who had availed themselves of the privilege which they felt at the time they had a perfect right to do, after they learned of the Cohen decision and after that was finalized, they telephoned or wrote to the Inquiry and requested leave to come back. Evidently Mr. Sgarlato did not do that, and the purpose of these questions is to ascertain why he didn't. That's all.
>
> The Witness: Well, I did do something. I came in and I saw Mr. Hurley personally.
>
> Q. Could you fix a date when you came in to see Mr. Hurley? A. No, I spoke to him and I told him him that I'd be glad to come in and testify if he would tell me exactly what he wanted, not to just go flying all over the place on any kind of file. If they told me what they were interested in I'd be glad to answer whatever questions he asked or whatever files they were interested in.

Q. Is this before you received a letter, telephone call or a subpoena when you contacted Mr. Hurley? A. Yes." (Exh. 16, s.m. 37520-37521)*

The Judicial Inquiry acceded to petitioner's request. By letter of October 24, 1961, referred to in the petition (p. 3), petitioner was asked to appear at the Additional Special Term on November 2, 1961. He was asked to bring with him his financial records "pertinent to your practice of law" as described in a subpoena duces tecum, petitioner was also advised that he would "subsequently be asked to produce certain of the legal files relating to cases processed by yourself".

On November 2, 1961, petitioner appeared at the Additional Special Term accompanied by counsel. In response to specific questions as to the position he wished to take, petitioner informed the Court that he was willing to answer any relevant questions and that he desired to withdraw his previous claim of privilege against self-incrimination. This is what the stenographic transcript at the preliminary investigation showed:

"Q. At the time of your last appearance, Mr. Sgarlato, you invoked your privilege against self-incrimination and refused to answer certain questions put to you with regard to your practice of law, is that correct? A. That's right.

Q. At that time the only ground upon which you refused to testify was on the ground that to answer certain questions would tend to incriminate you, is that correct? A. That's right.

* The petition for writ of certiorari omits any reference to the fact that petitioner had voluntarily requested to appear and answer whatever questions that would be asked if he were told exactly what was wanted.

Q. At the time that you appeared, counselor, were you represented by counsel? A. I was not.

Q. At this time do you wish to withdraw that plea? A. Yes, sir.

The Court: You are willing, counselor, now to testify to all matters deemed by the Inquiry to be material and relevant?

The Witness: Yes, your Honor.

The Court: Of course subject to my rulings as to whether or not they are.

The Witness: Yes.

Mr. Harold Panken: Subject to your Honor passing upon the materiality of them.

The Court: Yes." (Exh. 16, s.m. 35236-35237)*

Thereafter, petitioner answered all questions put to him. On five subsequent occasions ending in November, 1962, petitioner with his counsel present, gave further testimony without ever raising a single objection on any constitutional ground. Nor did petitioner make any claim of privilege with respect to receipt in evidence of any of his records (Exh. 16, s.m. 35234-35251; 37515-37597; 38704-38796; 39038-39183; 39184-39279; 39504-39541).

Petitioner was thereafter served with written charges of professional misconduct in connection with his practice of law. Petitioner filed an answer in which he admitted charge 26, namely, that he failed to maintain a separate trust account for the deposits of clients' and escrow funds, commingled said funds with his own money, such misconduct being a violation of Rule 4 of the Special Rules of the Appellate Division Regulating the Conduct of Attorneys. In

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* Here, again, the petition for writ of certiorari omits the fact of petitioner's express withdrawal of claim of privilege.

no part of his answer did petitioner raise any issue involving constitutional rights.

In response to petitioner's answer to charges which he denied, the Appellate Division designated a justice of the New York Supreme Court to herein report upon the issues raised by the pleadings, Mr. Justice Nicholas M. Pette. Accordingly, lengthy hearings were held. The hearings extended over a period of two months. At no time in the hearings held upon the charges made, did petitioner assert constitutional privilege to refuse to testify or to exclude any evidence. When a transcript of petitioner's testimony given in the preliminary investigation (Exh. 16) was offered in evidence, petitioner stated:

"I have no objection." (R 75)

The record will be searched in vain for the slightest suggestion that petitioner's consent to the introduction in evidence of the transcript of his testimony was given, as is now contended in his petition (p.4) "under threat of disbarment", implied or otherwise. Throughout the hearings, petitioner maintained his position that he was not going to claim privilege, and desired "to be frank and candid with the Appellate Division and with the Court, in view of the fact that I feel I have nothing to hide in this proceeding". (R 209).

After the hearings were closed, Mr. Justice Pette filed a report with the Appellate Division making findings of fact. Justice Pette reported that the facts supported seven charges and that in his opinion, the evidence as to the remaining charges was insufficient. Respondent moved to confirm the findings adverse to petitioner and to disaffirm findings with respect to eight charges. In response, thereto,

petitioner raised no contention that he had been deprived of constitutional rights. This was no inadvertent omission. It was intentional and in accordance with the record of the hearings held upon the charges.

It was not until the Appellate Division decided against petitioner on the merits and imposed a two-year suspension that petitioner contended that the receipt in evidence of a transcript of his testimony in the preliminary investigation was violative of his constitutional rights. This contention was initially raised upon a motion to the Appellate Division for reargument or for leave to appeal. It is most significant that no such contention was made while the motion to confirm and disaffirm the findings of Justice Pette, was sub judice before the Appellate Division, even though this Court decided *Spevack* v. *Klein,* 385 U.S. 511, a month prior to the decision and order of the Appellate Division suspending petitioner. Petitioner in support of his motion for reargument and leave to appeal, revealed that notwithstanding his cognizance of the decision of this Court in *Spevack* v. *Klein,* he withheld his present contention from the Appellate Division because of his "hope that I perhaps faced nothing more than a censure."

This revealing admission is stated in petitioner's affidavit:

> ". . . my reading of the essentially favorable report of the Referee, which had raised in me the hope that I perhaps faced nothing more than a censure, doubtless operated also to slow my own reactions of decisiveness between January 16, 1967 when Spevack was decided and February 14, 1967 when this Court decided my case."

Thus, the facts contained in the record show that at no time in the course of the disciplinary proceedings did petitioner assert any claim of privilege by reason of self-incrimination. Rather, the record shows that petitioner deliberately withdrew his claim of privilege in testifying before the preliminary investigation and continued this position throughout the hearings before Mr. Justice Pette. It is upon this record that the New York Court of Appeals affirmed without opinion and it is in this context that the recital was made in the amended remittitur of the Court of Appeals:

> "The Court of Appeals held there was no violation of Appellant's constitutional rights".

ARGUMENT

1.

The first question presented by petitioner reads as follows:

> "1. Whether the Fifth Amendment Privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, forbids the use in judicial disciplinary proceedings with respect to an attorney, of inculpatory evidence obtained from the attorney by the coercive threat of disbarment if he refused to furnish the incriminating evidence."

This question is without basis in fact. The record demonstrates that the petitioner's evidence at the preliminary hearings was not given as a result of "coercive threat of disbarment if he refused to furnish the incriminating evidence".

On the contrary as shown by our statement of the case, petitioner upon learning of this Court's decision in *Cohen*

v. *Hurley,* volunteered to return and testify at the Additional Special Term and answer any questions that might be put to him (Exh. 16, s.m. 37520-37521). His request for an opportunity to return and testify was not induced by any threat whatever by the Judicial Inquiry. In making this request, petitioner admittedly told counsel for the Judicial Inquiry that he would be "glad to answer whatever questions" counsel "asked or whatever files they were interested in".

Petitioner's decision to return to the Inquiry was thus the product of a voluntary choice to withdraw his previous claim of privilege. And when he appeared with counsel at the Additional Special Term on November 2, 1961, petitioner was again given the opportunity to assert his constitutional privilege if he so desired. He was reminded that in 1959 he had invoked his privilege against self-incrimination and was specifically asked if he now wished to withdraw that plea. His response was that he wished to withdraw his claim of privilege and informed the Court that he was willing "to testify to all matters deemed by the Inquiry to be material and relevant" (Exh. 16, s.m. 35237). No threat, expressed or implied, was made that if he did not withdraw his claim of privilege and furnish relevant evidence, he would be disbarred or otherwise disciplined. Petitioner chose to withdraw his privilege with the advice of his counsel. He gave no indication that his decision to testify and produce requested records was made because of any threat of harm if he failed to do so.

And when the transcript of his testimony at the Inquiry (Exh. 16) was offered in evidence at a hearing in the disciplinary proceeding, petitioner had another opportunity to assert that his testimony given at the preliminary investi-

gation had been obtained in violation of his privilege against self-incrimination. Instead petitioner affirmatively stated that he had no objection to the introduction into evidence of his prior testimony (R. 75). Consonant with petitioner's then position that he made no claim of violation of constitutional right, he testified as a witness in the prosecution of the disciplinary proceeding without demur or objection and supplemented this testimony by testifying as his own witness.

After the filing of the report of the Justice presiding at the hearings, respondent moved to confirm and to disaffirm in part the findings of the reporting Justice. Again petitioner made no claim that any of his constitutional rights had been violated. It was not until after the Appellate Division had rendered its decision on the merits that petitioner, for the first time, raised a contention that the receipt in evidence of the transcript of his testimony previously given at the preliminary investigation violated his privilege against self-incrimination. Petitioner's reason for having raised no such constitutional issue at the hearings is most significant. In his own words he had "the hope that I perhaps faced nothing more than a censure".

Petitioner may not alter the character of the controversy actually presented for determination after losing on the merits by asserting a contention that he had deliberately refrained from making. It is in these circumstances that the Court of Appeals rejected petitioner's contention that his suspension from the practice of law was based on a violation of constitutional rights and affirmed the order of the Appellate Division unanimously without opinion.

Fully on the facts in this case, it is pertinent to quote the observation made by the New York Court of Appeals in

Matter of Zuckerman, 20 N Y 2d 430, cert. den. 390 U.S. 925, sub. nom., *Zuckerman* v. *Greason*, rehearing denied, 390 U.S. 975, at page 439:

> "They [lawyers] are not required to invoke the Fifth Amendment to the Constitution of the United States but may choose to reveal their professional conduct to the scrutiny and evaluation of the Appellate Division when its propriety is drawn in question."

Petitioner having expressly withdrawn any claim of privilege against self-incrimination and having deliberately chosen to reveal his professional conduct in the hope that he would receive "nothing more than a censure", is in no position to contend in this Court that his suspension for a two-year period, instead of a censure, violated his constitutional rights.

2.

Petitioner, in his petition for the first time claims that his production of financial records and case files constituted an illegal search and seizure under the Fourth Amendment. No such claim was made at the hearings in the disciplinary proceedings or before the Appellate Division or the Court of Appeals. This is conceded in the petition (p. 11). Accordingly this present assertion of violation of Fourth Amendment rights was never considered by the Appellate Division or reviewed by the Court of Appeals.

Petitioner's financial records described in a subpoena duces tecum were willingly produced. Nowhere in the transcript of the petitioner's testimony at the preliminary investigation (Exh. 16) does there appear any claim either by petitioner or his counsel that such production of his records

constituted an illegal search and seizure. At the hearings in the disciplinary proceedings petitioner made no objection to the introduction into evidence of records he had theretofore turned over to Inquiry counsel. In fact, at the disciplinary hearings, petitioner produced an additional case file and specifically stated that he was willing to answer any questions concerning it (R. 279).

3.

The petition asserts that with respect to the disciplinary proceedings (p. 4) "virtually all the proof was derived from petitioner's compelled disclosures and production". This is contrary to the fact. Proof of some of the serious charges of misconduct by petitioner found by the Appellate Division, rested on neither petitioner's testimony nor on any records he had produced.

Charge 1—that petitioner's compromised infants' negligence claims without Court approval, a violation of New York Statute (sec. 474 Judiciary Law; Art. 80 Civil Practice Act; Rule 294, Rules of Civil Practice) (A5-A10) was proved by incontrovertible documentary evidence. Petitioner's statements of retainer filed with the Appellate Division and his correspondence obtained from insurance carrier files disclosed his contingent fee retention on behalf of infant claimants (Exhs. 11-15, 42, 44, 45, 46, 49). From insurance carrier records there were obtained parents' releases accepted by the carriers in lieu of Court orders approving the settlements and insurance carrier drafts payable to petitioner and the parents of the infant claimants (Exhs. 1c, 1d, 1e, 3a, 3b, 3c, 47, 48). At the disciplinary proceedings petitioner admitted that he had compromised infants negligence claims without Court approval (R. 835-838). Evasion

of judicial scrutiny of settlements made in behalf of infants has been repeatedly deemed "grievous misconduct" (*Matter of Shufer*, 12 A D 2d 208, 214; *Matter of Gladstone*, 16 A D 2d 512, 515; *Matter of Feldman*, 17 A D 2d 553, 558).

Charge 7—was that petitioner had knowingly caused a complaint in an action to be prepared, verified and served, in which it was falsely alleged that one of the plaintiffs had been appointed guardian ad litem for two infant plaintiffs. This was clearly proved by evidence obtained from insurance carrier files, by certification of Court records, and by testimony of an insurance attorney and of petitioner's client (Exh. 1a, 2, 9, 10; R. 11-16, 46). Petitioner, when testifying as his own witness, admitted that the said allegations in the complaint he had prepared and served were untrue. (R. 844-845).

Charge 10—was that petitioner, in reckless disregard of the pertinent rule of the Appellate Division (A3-A4), filed numerous statements of retainer in contingent fee negligence matters which misstated his agreed terms of compensation. This charge was supported by statements of retainer filed by petitioner with the Appellate Division (Exhs. 11-15) and by Exh. 130, a tabulation received in evidence on petitioner's stipulation showing that in 52 instances, petitioner had retained contingent fees in excess of the percentage set forth in his statements of retainer. Petitioner testified at the disciplinary hearings that the fees he retained were in excess of the percentage set forth in the statements of retainer and conceded that the said statements were erroneous to that extent (R. 599-600, 854-855). The giving of false information in statements of retainer is serious misconduct (*Matter*

of Fata, 22 A D 2d 116, leave to appeal den., 15 NY 2d 487, cert. den. 382 U.S. 917).

Charge 22—that petitioner did not file statements in contingent fee negligence matters as required by the Special Rules (A3-A4). This was disclosed in the preliminary investigation by simple comparison of insurance carrier records with statements of retainer that petitioner had filed with the Appellate Division. In testifying at the disciplinary hearings in his own defense, petitioner admitted the truth of this charge (R. 1040-1041).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

SOLOMON A. KLEIN
Respondent, Attorney Pro Se

APPENDIX A

Order of Court of Appeals Amending Remittitur

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of York, held at Court of Appeals Hall in the City of Albany on the Second day of July A. D. 1968.

Present,

HON. STANLEY H. FULD,
Chief Judge, presiding,

Mo. No. 689

In the Matter of
Santo R. Sgarlato, Jr., an Attorney.
Solomon A. Klein,

Respondent,

Santo R. Sgarlato, Jr.,

Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Appendix A—Order of Court of Appeals Amending Remittitur

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that he was deprived of due process in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States in that there were introduced against him in this disciplinary proceeding statements elicited from him under threat of disbarment if he did not make such statements. The Court of Appeals held that there was no violation of appellant's constitutional rights.

And the Appellate Division of the Supreme Court, Second Judicial Department, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Gearon Kimball
Deputy Clerk

APPENDIX B

Statutes and Rules Involved

United States Constitution, Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

United States Constitution, Amendment XIV

Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Section 90 of New York Judiciary Law

1. . . .

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct . . . or any conduct prejudicial to the administration of justice. . . .

Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department

Rule 2. Penalty. An attorney who violates any of these special rules shall be deemed to be guilty of professional misconduct within the meaning of subdivision two of section 90 of the Judiciary Law.

Rule 3. Statements as to retainers in actions or claims arising from personal injuries. . . . Every attorney who, in connection with any action or claim for damages for

personal injuries . . . accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of any such retainer or agreement of compensation, sign and file in the office of the clerk of the Appellate Division, Second Judicial Department, a written statement setting forth the date of any such retainer or agreement of compensation, the terms of compensation, the name and home address of the client and the name and office address of the attorney, and the date and place of the occurrence of the injury. . . .

Rule 4. Deposit of collections-notice. Where an attorney who has accepted a retainer or entered into an agreement as referred to in the preceding rule, shall collect any sum of money upon any such action, claim or proceeding, either by way of settlement or after a trial or hearing, he shall forthwith deposit the same in a bank or trust company in a special account, separate from his own personal account and shall not commingle the same with his own funds. Within ten days after the receipt of any such sum he shall cause to be delivered personally to such client or sent by registered mail, addressed to such client at the client's last known address, a statement in writing setting forth the amount received, the date when and the name of the person from whom he received the same, and the amount which he claims to be due for his services and disbursements, specifying the same separately. At the same time the attorney shall pay or remit to the client the amount shown by such

statement to be due the client, and he may then withdraw for himself the amount so claimed to be due him for compensation and disbursements. . . .

Rule 5. Preservation of records of actions, claims and proceedings. In every action, claim and proceeding of the nature described in rule three, attorneys for all the parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought.

N.Y. Judiciary Law, Sec. 474

§474. *Compensation of attorney or counsellor*

The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law, except that no agreement made hereafter between an attorney and a guardian of an infant for the compensation of such attorney, dependent upon the success of the prosecution by said attorney of a claim belonging to said infant, or by which such attorney is to receive a percentage of any recovery or award in behalf of such infant or a sum equal to a percentage of any such recovery or award, shall be valid or enforceable unless made as hereinafter provided. An attorney may contract with the guardian of an infant to prosecute, by suit or otherwise, any claim for the benefit of an infant for a compensa-

tion to said attorney dependent upon the success in the prosecution of such claim, subject to the power of the court, as hereinafter provided, to fix the amount of such compensation. Whenever such a contract shall have been entered into between an attorney and a guardian of an infant, upon the recovery of a judgment, or the obtaining of an award in behalf of the said infant, or upon any compromise or settlement of such claim, the attorney may apply, upon notice to the guardian, to the judge, justice or surrogate before whom the said action or proceeding was tried, or to whom an application for compromise or settlement under article eighty of the civil practice act was made, in case the said action or proceeding was tried, or the said application was made at a court held within this state; or to a special term of said court, in case the said action or proceeding was tried before some person other than a justice thereof, or said claim was compromised or settled after said suit was begun, or in case of the death or disability of the judge or justice before whom the action was tried; or to special term of the supreme court in case the recovery, award, compromise or settlement was not had in any court of this state. Such application shall set forth briefly the contract, the services performed by the attorney and pray that there be awarded to him a suitable amount out of the recovery, award, compromise or settlement obtained through his efforts as attorney on behalf of the infant. The court, judge or surrogate to which such application is made, upon being satisfied that due notice of the said application has been given to the said guardian, shall proceed summarily to determine the value of the services of said attorney,

taking such proof from either the attorney or the guardian by affidavit, reference or the examination of witnesses before the said court, judge or surrogate, as may seem to be necessary and proper, and shall thereupon make an order determining the suitable compensation for the attorney for his services therein, which sum shall thereafter be received by the said attorney for his services in behalf of the said infant; and no other compensation shall be paid or allowed by the guardian for such services out of the estate of said infant. If a copy of such order awarding the compensation with notice of entry be thereafter served by the said attorney upon the adverse party to the said litigation or the person making such compromise or settlement and upon the custodian of the funds recovered, in case there be such custodian, such award shall become and constitute a lien to the amount thereof on behalf of the said attorney upon such recovery, award, settlement or fund.

Article 80 of New York Civil Practice Act

Art. 80—PROCEEDING FOR THE SETTLEMENT OF AN INFANT'S CLAIM

Section

1320. When application may be made.

1321. Who must make application.

1322. Notice to be given.

1323. Denial of application where settlement would exceed court's jurisdiction.

1324. Final order.

§ 1320. *When application may be made.* In any instance in which an infant has a claim for damages for personal injury, injury to property or for breach of contract, an application for approval of a compromise or settlement of such claim may be made to any court or a judge of any court in which an action could have been brought to recover the amount of the proposed settlement. No application shall be made under this article if an action has been commenced on behalf of the infant to recover such damages.

Added by L. 1947 ch. 366, effective Sept. 1.

§ 1321. *Who must make application.* Such application must be made by petition of the father or mother of the infant, or if the parents are separated, then by the parent having legal custody of the infant, or if the parents are dead, incompetent or have deserted or abandoned the infant, then by a special guardian appointed for such purpose. When the application is made on behalf of an infant of the age of fourteen years or older, the infant must join therein.

Added by L. 1947 ch. 366, effective Sept. 1.

§ 1322. *Notice to be given.* Notice of this proceeding shall be given, in the discretion of the court or judge, to such persons and in such manner as the court or judge may direct.

Added by L. 1947 ch. 366, effective Sept. 1.

§ 1323. *Denial of application where settlement would exceed court's jurisdiction.* If the court or judge shall find that an adequate settlement would exceed the amount which could be recovered in an action in such court, the court or judge shall deny the application without prejudice to peti-

tioner's right to make application in a court of appropriate jurisdiction.

Added by L. 1947 ch. 366, effective Sept. 1.

§ 1324. *Final order.* Upon approval of the application by the court or judge, a final order of settlement may be entered without costs.

Added by L. 1947 ch. 366, effective Sept. 1.

Rule 294 of New York Rules of Civil Practice

Rule 294. *Application to compromise infants' claims or actions; procedure; conflicting interests of infants attorneys.* On any application in a pending action or under article eighty of the civil practice act, for the approval by a court of the compromise or settlement of a claim or cause of action belonging to an infant, the procedure shall be as follows:

1. No attorney having or representing any interest conflicting with that of an infant may represent such infant. If the infant and his guardian or petitioner are represented by an attorney, and if the court or judge deem it necessary, a full examination by the court or judge or by an official referee may be had into all the facts regarding the reasonableness and propriety of such settlement and of the fee which the infant's attorney asks to be allowed.

* * * * *

3. The infant, the petitioner or guardian ad litem, and the attorney making the application shall attend before the court. However, if unusual circumstances demonstrate that

the attendance of an infant and guardian ad litem before the court is unnecessary to a proper determination and would constitute a hardship on such attorney and guardian ad litem, the court may waive the attendance of the infant and guardian ad litem, or either, noting the reasons therefor in the order. In addition to the document and papers hereinafter required to be submitted to the court, the court may also require such further documents and information to be submitted to it as it may deem necessary to a proper determination of the application.

* * * * *

7. If the infant and his guardian or petitioner are represented by an attorney, the affidavit of the attorney shall set forth by whom, on what date and under what terms he was retained, the services rendered by him, the fee he asks to be allowed, the acts complained of, the terms of the proposed settlement with a brief statement of his reasons for recommending the same; and shall state that he has not become concerned in the application or its subject matter at the instance of such defendant directly or indirectly and that he has not received and is not to receive any compensation from such defendant directly or indirectly.

If the infant and his guardian or petitioner are not represented by an attorney, and the papers are prepared by the attorney for the defendant, the affidavit of such attorney shall contain the information required by subdivision 2.

* * * * *

9. Upon the approval of a proposed settlement by the court or judge, an order of settlement or a judgment may be entered without costs.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 510

SANTO R. SGARLATO, JR.

Petitioner,

v.

SOLOMON A. KLEIN,

Respondent

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Respondent

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent opposes certiorari with respect to the claim of violation of the Fifth Amendment privilege against self-incrimination on the dual grounds (1) that petitioner voluntarily testified and withdrew any claim of privilege and (2) that proof of the charges was not dependent upon petitioner's compelled testimony. These grounds of opposition are contradicted by the facts and inconsistent with controlling legal principles.

1. Clearly, the Judicial Inquiry coerced petitioner's testimony by threat of disbarment. Respondent does not dispute the fact that when petitioner originally appeared and

responded to the Judicial Inquiry's subpoena on November 5, 1959, he refused to answer questions and to produce records in reliance on the Fifth Amendment privilege and that his submission to the Judicial Inquiry's request for information occurred after this Court's decision in *Cohen v. Hurley*, 366 U.S. 117, holding that an attorney could be disbarred for such refusal.

Respondent contends that after the *Cohen v. Hurley* decision petitioner voluntarily requested an opportunity to appear and testify and that the Judicial Inquiry's letter of October 24, 1961 acceded to this request (Br. in Opp., pp. 3-4). Regardless of the precise circumstances under which petitioner testified it seems clear that his testimony was coerced as a result of the *Cohen v. Hurley* decision. But the facts do not bear out respondent's representation of the subsequent events. Petitioner did communicate with counsel for the Judicial Inquiry before he received the letter of October 24, 1961, and offered to testify and produce records with respect to any specific matters in which the Judicial Inquiry was interested. No understanding was reached as a result of this conversation,[1] however, and petitioner did not appear to testify and produce records before the Judicial Inquiry until after he had received the letter of October 24, 1961. It is somewhat of a distortion to suggest that this letter, a copy of which is set forth in the appendix to this brief, which not only was extremely broad in scope and not limited to particular matter but also specifically adverted to this Court's affirmance of the disbarment of Cohen, was a response to petitioner's request for an opportunity to appear and testify. And respondent

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[1] Immediately following petitioner's testimony at the preliminary immediately quoted by Respondent (Br. in Opp. pp. 3-4) is the following colloquy: "Q. What understanding did you have, or did you reach an understanding with Mr. Hurley as to when you would appear or what records you would produce? A. There was no understanding." (pp. 37, 521-2.)

has not heretofore made any such claim.[2] In any event, petitioner's withdrawal of his claim of privilege under the threat of disbarment, fairly implied from the Judicial Inquiry's explicit reference to *Cohen v. Hurley*, does not constitute a waiver of his constitutional rights. The simple fact is that petitioner would have been disbarred if he had invoked the privilege in the disciplinary proceeding before this Court overruled *Cohen v. Hurley* in *Spevack v. Klein*, 385 U.S. 511. This was recognized by the New York Court of Appeals in *Zuckerman v. Greason*, 20 N.Y.2d 430, 285 N.Y.S.2d 1 (1967). Upon reconsideration after remand by this Court (386 U.S. 15), the Appellate Division, Second Department, in effect held that the failure of the petitioners to object in the disciplinary hearing to the reception of self-incriminating evidence precluded consideration of the merits of the constitutional claim. *Greason v. Zuckerman*, 28 A.D. 2d 907, 282 N.Y.S.2d 951. The Court of Appeals, however, passed upon the merits of the constitutional claim, expressly recognizing that the attorneys' reliance on the privilege could have resulted in their disbarment:

> Appellants now contend that sustaining them [the charges] wholly or partly on the basis of data submitted by Zuckerman and Haber is unconstitutional under the holding of the Supreme Court in their case in light of *Spevack* and *Garrity*. * * * If Zuckerman and Haber's constitutional contention be correct on this appeal, it might be argued with

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[2] Respondent's version of the events as set forth in his brief in the Appellate Division is as follows:

"On November 5, 1959, respondent [petitioner here] was called before the Judicial Inquiry, pursuant to subpoena. He refused to answer proper questions put to him upon the grounds that to give answers to the questions would tend to incriminate him. Following *Cohen v. Hurley*, 366 U.S. 117, respondent was re-called as a witness before the Judicial Inquiry on November 2, 1961. He withdrew his plea of Fifth Amendment rights, testifying and producing records required by the subpoenas served upon him."

some force that neither of them was obliged to object in order to raise the point, in as much as making that objection could have resulted automatically in their disbarment for so long as *Cohen v. Hurley* remained the law.

Petitioner's failure to claim the privilege under the threat of disbarment for doing so cannot be construed as a waiver of the constitutional claim. "There is a presumption against a waiver of constitutional rights * * * and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or previlege". *Brookhart v. Janis*, 384 U.S. 1, 4. If every reasonable presumption against the waiver of fundamental constitutional rights in indulged (*Johnson v. Zerbst*, 304 U.S. 458, 464; *Glasser v. United States*, 315 U.S. 60, 70), the "high standards of proof for the waiver of constitutional rights" to establish that "the waiver is made voluntarily, knowingly, and intelligently" (*Miranda v. Arizona*, 384 U.S. 436, 475) have obviously not been met.

Petitioner promptly invoked the privilege against self-incrimination after this court on January 16, 1967, held in *Spevack v. Klein*, 385 U.S. 511, overruling *Cohen v. Hurley*, *supra*, that an attorney's reliance upon the privilege could not be the basis for disbarment. At that time cross-motions to confirm and disaffirm Justice Pette's report on the disciplinary proceedings, dated April 12, 1966, were pending before the Appellate Division. The Appellate Division made its ruling on February 14, 1967. On April 10, 1967, petitioner moved for reargument and, alternatively, for leave to appeal to the Court of Appeals relying upon this Court's decision in *Spevack v. Klein*. In the circumstances, the claimed abandonment of the privilege is rendered irrelevant by petitioner's renewed reliance upon it after this Court's decision in *Spevack v. Klein*. This decision constituted a supervening event which permitted the constitutional question to be raised again by petitioner's motion for reargument. *State Farm Ins. Co. v. Duel*, 324 U.S. 154, 160-161; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673.

Moreover, the federal constitutional question raised by the motion for reargument in the Appellate Division and urged on the appeal in the Court of Appeals is appropriately presented for review by this Court since it was considered and passed upon by the courts below. *Great Northern Ry. co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367; *Whitney v. California*, 274 U.S. 357, 360. The Appellate Division obviously considered the constitutional question to have been properly presented when, by its order of July 10, 1967, it granted petitioner leave to appeal certifying that "questions of law have arisen which in its opinion ought to be reviewed by the Court of Appeals." The only questions of law involved were the constitutional ones. The Court of Appeals similarly considered the constitutional question to be properly before it since its amended remittitur recited that on appeal there was presented and necessarily passed upon the question of whether petitioner "was deprived of due process in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States in that there were introduced against him in this disciplinary proceeding statements elicited from him under threat of disbarment if he did not make such statements. The Court of Appeals held that there was no violation of appellant's [petitioner's] constitutional rights."

The Court of Appeals' assumption that the constitutional question was before it and its disposition of that question eliminate any problem for this Court with respect to whether the constitutional question was properly raised below. *Whitney v. California*, 274 U.S. at 360-361; *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436.

Respondent's intimation that the Court of Appeals' express holding that "There was no violation of appellant's constitutional rights" was based upon a determination that petitioner did not properly assert a claim of privilege is contrary to the plain reading of the language employed. This

Court construed virtually identical language by the New York Court of Appeals in *Lanza v. New York*, 370 U.S. 139, 142 n. 6, as making clear that the Court "had passed upon this federal constitutional claim, and that its judgment was not based upon an independent state ground." The Court of Appeals' obvious deliberate repetition of this phraseology in the present case requires the same conclusion here.

2. Respondent makes a blanket denial of petitioner's assertion that "virtually all the proof was derived from petitioner's compelled disclosure and production". He supports this blanket denial by the assertion that proof of "some" of the charges was not based on petitioner's testimony or on records that he had produced and proceeds to discuss the evidence with respect to but four of the fifteen charges sustained.

Respondent's contention in this respect is subject to a number of shortcomings. Petitioner categorically asserts that virtually all the evidence at the disciplinary hearing consisted of his coerced testimony and records or was derived from leads obtained through his compelled disclosures. Although petitioner extensively argued the constitutional claim of privilege in his motion for reargument in the Appellate Division and on his appeal in the Court of Appeals, respondent has not heretofore contended that the charges were sustainable on the basis of uncoerced evidence, which would have been an independent state ground of decision, and the Court of Appeals did not dispose of the case on that ground. Moreover, even now, when this contention is advanced for the first time, respondent makes no claim that the evidence supporting the four charges discussed was not obtained through leads provided by petitioner's compelled evidence. And even respondent's discussion of the four charges makes clear that they could not have been established without leads provided by petitioner or by his direct evidence. In his discussion of each of the four charges, respondent relies upon petitioner's testimony

and it appears that without this testimony the evidence was insufficient to support the charge. Furthermore, since the Appellate Division sustained fifteen charges against petitioner, respondent's reference to only four is an admission that eleven of the charges were established by the evidence coerced from petitioner. Certainly, it cannot be assumed that the penalty of suspension which will be destructive of petitioner's practice and livelihood would have been imposed on the basis of four charges particularly in the light of the findings of the Supreme Court Justice who heard the evidence "that no complaint was ever made by "any of his clients, that many of the charges were "due to his inexperience and ignorance," and that he "has demonstrated that he has a potential useful service to the public and the bar."

Respondent's suggestion that some of the charges were established by independent proof is belied by the fact that the Judicial Inquiry took no action when petitioner invoked the constitutional privilege on November 5, 1959. Some two years later, after this Court's decision in *Cohen v. Hurley*, the Judicial Inquiry resumed the practice of obtaining information by the implied threat of disbarment and recalled petitioner to furnish inculpatory information. Charges were not preferred until November, 1964, after petitioner had given almost 500 pages of testimony before the Judicial Inquiry. His testimony at the disciplinary hearings with respect to the charges exceeded 1100 pages.

Respectfully submitted,

MORTON LIFTIN
818 - 18th Street, N.W.
Washington, D.C. 20006
Attorney for the Petitioner

APPENDIX

JUDICIAL INQUIRY
SUPREME COURT, KINGS COUNTY
BOROUGH HALL, BROOKLYN 1, N.Y.
MAIN 4-7851

DENIS M. HURLEY
Counsel

October 24, 1961

Santo R. Sgarlato, Jr., Esq.
26 Court Street
Brooklyn 1, New York

Dear Sir:

On November 11, 1959 you refused to answer questions pertaining to your law practice before the Additional Special Term on the ground of possible self incrimination. As you are probably aware, the Supreme Court of the United States as well as the New York Court of Appeals has now affirmed the decision of the Appellate Division, Second Judicial Department disbarring Albert Martin Cohen for his refusal to answer pertinent questions before the Additional Special Term, albeit Mr. Cohen likewise based this refusal on the grounds of self incrimination (9 A.D. 2d 436; aff'd. 7 N.Y.2d 488; aff'd. 366 U.S. 117.)

Mr. Justice Baker is prepared to accord you another opportunity to testify at the Additional Special Term if you will appear at Room 301, Borough Hall, on November 2, 1961, at 10:30 a.m. You should bring with you all financial records pertinent to your practice of law as described in the subpoena duces tecum served upon you. You will subsequently be asked to produce certain of the legal files relating to cases processed by yourself. However, for the time being, it will be sufficient if you produce the above mentioned financial records.

Should you fail to appear at the date and time specified, it will be deemed that you wish to stand on the record of your prior appearance before the Additional Special Term.

JUDICIAL INQUIRY

JOSEPH A. ESQUIROL, JR.
Assistant Counsel

JAE:cas
By Hand